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No. 93-1757

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1993

SUSAN SOLOMON PATELLA, LLOYD RIBNER, as executor of the estate of MURIEL RIBNER, DENISE TUCKER, DONALD HALPERIN, Commissioner of the Division of Housing and Community Renewal of the State of New York, G. OLIVER KOPPELL, Attorney General of the State of New York, and NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Petitioners,

- against -

RESOLUTION TRUST CORPORATION, as Receiver for Nassau Savings and Loan Association, F.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE CITY OF NEW YORK IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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June 21, 1994

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SUSAN SOLOMON PATELLA, LLOYD RIBNER, as executor of the estate of MURIEL RIBNER, DENISE TUCKER, DONALD HALPERIN, Commissioner of the Division of Housing and Community Renewal of the State of New York, G. OLIVER KOPPELL, Attorney General of the State of New York, and NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Petitioners,

- against -

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AMICUS CURIAE BRIEF OF THE CITY OF NEW YORK IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE THE CITY OF NEW YORK

Over the past fifty years New York State has employed emergency rent and eviction regulation as a

means of protecting its citizens from the devastating effects of severe and re-occurring housing shortages. Residents of New York City are particularly distressed by this crisis.

There are approximately 2.05 million rental units in New York City; this number represents 69 percent of the total housing stock. Half of the rental stock in New York City is regulated by rent stabilization laws. Over 2.31 million New York City residents retain possession of their homes under the authority of state and local rent regulations.[1]

The New York State Legislature authorizes the state and local governments, under certain circumstances, to regulate the landlord-tenant relationship in order to prevent extractions of unreasonable and oppressive rents and to forestall profiteering and speculation. The general object of these laws is to establish fair rent levels in a market that, in the absence of such laws, would drive rents to unfair levels because of chronic shortages. Statutory rent and eviction regulation also reflects the particular need of the urban tenant for certainty of possession and protection against undue hardship, harassment and dislocation.

It is well settled that the state cannot effectively promote the availability of housing at reasonable rents where it cannot with equal effectiveness regulate a landlord's power to arbitrarily evict or harass a tenant. In

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[1] Testimony of Deborah Wright, the Commissioner of the New York City Department of Housing Preservation and Development, before the New York City Council Committee on Housing and Buildings, March 10, 1994.

a city with an unusually large renter class, these policy concerns are greatly amplified.

Therefore, the holding of the United States Court of Appeals for the Second Circuit that tenancies which exist solely by reason of state and local rent regulatory law are contractual in nature and are subject to repudiation by the Resolution Trust Corporation ("RTC") is of particular concern to the City of New York.

The City urges that the decision below unlawfully preempts the constitutional exercise of the police power. The decision allows RTC to affect the rental stock of New York City during a housing emergency without regard to the statutory scheme that has evolved over the past fifty years in response to this critical urban crisis. Consequently, the specter of RTC's control over New York City's rent-regulated housing stock creates an unstable economic and social environment for over 30 percent of the City's population whose possession of their homes is predicated upon legislative mandate.

Furthermore, it is impossible to calculate the collateral harm this decision will bring to New York City's economy. For example, without the assurance of an affordable and stable rental stock, it is difficult to attract new business and to keep existing business from fleeing the City.

STATEMENT OF THE CASE AND INTRODUCTION

The foundation of emergency rent and eviction legislation in New York State is rooted in the state's inherent duty to provide for the health, safety and general

welfare of its citizens. Rent and eviction regulation is a vital and responsive scheme designed to preserve affordable housing, maintain community stability and afford protection against discrimination in eviction. Nonetheless, rent and eviction regulation retains an evolutionary aspect which provides for the transition of rent-controlled units to rent-stabilized units and generates methods and formulas for eventual decontrol.

A. Overview of New York State's Rent Regulatory Laws.

Following a period of federal and state rent controls, in order to limit the effect of a continuous local housing shortage in 1962, the New York State Legislature enacted the Local Emergency Housing Rent Control Act (L. 1962, c. 21, codified at McKinney's Unconsolidated Laws ("McK. Unconsolidated Laws") §§ 8601-8617). Recognizing the unique needs of cities with populations over one million people the Legislature authorized the local administration of rent control in such communities. Accordingly, the New York City Council enacted the New York City Rent and Rehabilitation Law (Local Law No. 20, 1962, now codified in the Administrative Code of the City of New York ("Adm. Code") §§ 26-401-415). This law continued regulations for multi-family buildings constructed prior to February, 1947.

By the spring of 1968 the rental vacancy rate in New York City had plummeted to a low of 1.23 from 3.19 in 1965 (JA-311).[2] In response to this crisis, the New York City Council enacted the Rent Stabilization Law of 1969

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[2] References to the joint appendix in the Court of Appeals are indicated as ("JA-___").

1969 (Local Law No. 16, 1969, now codified in the Adm. Code §§ 26-501-520). Rent stabilization regulation basically applied to apartments which had been completed after February 1947 and apartments that had become decontrolled through subdivision, conversion or luxury decontrol.

Once again in 1974, in response to excessive rent increases in the decontrolled sector caused by low vacancy rates, the inadequate supply of standard rental housing, and an increase in the formation of new households, intervention became necessary. The State Legislature enacted the Emergency Tenant Protection Act ("ETPA"), (L. 1974 c. 576, now codified in McK. Unconsolidated Laws §§ 8621-8634). The ETPA was implemented in New York City by resolution of the City Council on June 20, 1974, now codified in the Adm. Code § 26-501-520.

The ETPA, inter alia, established that housing emergencies exist whenever a local vacancy rate falls to 5 percent or less. Appreciating the disastrous impact that the premature withdrawal of government regulation could have on a community and the local economy, the act required that the end of a housing emergency may not be declared without first holding a public hearing on ten days notice (McK. Unconsolidated Laws § 8623). Furthermore, the act made void as against public policy any waiver by a tenant of any of the benefits provided by the statute. (McK. Unconsolidated Laws § 8631).

New York State rent and eviction regulations underwent its next comprehensive review and revision in 1983 when the Legislature enacted the Omnibus Housing Act (L. 1983 c. 403). Pursuant to this act the administration

Division of Housing and Community Renewal ("DHCR"). The DHCR adopted the existing rent and eviction regulations of New York City (now set forth in sections 2520.1 - 2530.1 of Title 9 of the Official Compilation of the Codes, Rules and Regulations of the State of New York ("NYCRR") Part 2520).

This act, inter alia, granted DHCR the authority to impose administrative penalties of up to $2,500 in cases where a landlord was found to have repeatedly harassed a tenant. It required the registration of all stabilized rents and provided a four year statute of limitations for the filing of non-willful overcharge claims. Treble damages were authorized for any willful rent overcharge provided the claim is filed within two years of the overcharge.

Notably, the act addressed the State's interest in shielding its elderly and disabled citizens from dislocation by prohibiting landlords from evicting senior citizens or disabled persons where the landlord would otherwise be permitted to obtain possession of a rent-regulated apartment. See, Governor's Approval Memorandum, 1983 New York State Legislative Annual, at 178.

In furtherance of the State's policy to promote social and economic stability, the class of citizens protected from eviction by landlords who seek possession of rent-regulated apartments was expanded to include long-term tenants as well as senior citizens and disabled persons. A long-term tenant is a tenant who regardless of age has resided in a dwelling for twenty years or more. (L. 1984 c. 234). Likewise, for the purpose of determining the succession rights to a rent-regulated apartment, the DHCR expanded the definition of family member in 1990 to

include persons residing with the tenant who can prove an interdependence between themselves and the tenant stemming from an emotional and financial commitment. 9 NYCRR § 2520(o)(2).

Addressing the trend towards cooperative and condominium conversion, the Legislature enacted a series of amendments to the New York General Business Law assuring the continued tenancy of non-purchasing tenants who are protected by rent regulation laws at the time of conversion. The Legislature specifically noted that due to the housing crisis in New York City, greater care must be taken to preserve the homes of those tenants who are protected by rent and eviction laws, especially the elderly for whom relocation is a unique hardship. (L.1982 c. 555; L.1986, c. 850 [see, McKinney's 1986 Session Laws, vol. 2, pp. 2089-2090]; L.1989, c. 473 [see, McKinney's 1989 Session Laws, vol. 1, pps. 942-943]. See, New York General Business Law Article 23-A, §§ 352-eeee(1)(e)(f)(g), (2)(c)(ii)and (iii).

Most recently the Legislature enacted the Rent Regulation Reform Act of 1993 (L.1993, c. 253). With a view toward achieving the state's ultimate objective to oversee the transition from regulation to a normal market of free bargaining between landlord and tenant, the act, inter alia, provides a formula for luxury decontrol of apartments based on rent, and rent in conjunction with the residents' steady annual income. Additionally, the act calls for a comprehensive study to be conducted regarding the impact and effectiveness of rent regulations and requires that the results of the study be reported to the Governor by June 30, 1995.

The Rent Regulation Reform Act, however, does not repeal or diminish the stability of tenure afforded elderly, disabled and long-term citizens. More importantly, the act confirms the continued existence of a serious housing shortage and extends rent regulation until June 15, 1997.

B. Factual Background.

According to the 1993 New York City Housing and Vacancy Survey the rental vacancy rate in New York City is estimated at 3.44 percent.[3] When compared with the last Housing and Vacancy Survey which was prepared in 1991, this vacancy rate reflects the loss of approximately 6,000 vacant-for-rent units.[4] In the years since the last survey the rental vacancy rate of the Boroughs of Manhattan and Queens has declined substantially, from 4.45 to 3.51 percent and from 3.67 to 3.07 percent respectively.[5]

It is within this climate that the RTC moves to extinguish the statutory tenancies of nine non-purchasing, rent-regulated tenants of a condominium located at 444 East 57th Street, Manhattan (JA-92). The record reveals that at least two of the tenants are senior citizens (AJ-342, AJ- 348) and at least five of the tenants have resided in their apartments over twenty years (AJ-342, AJ-345, AJ-348, AJ-351, AJ-354).

By its abrupt action RTC not only acted in contradiction of New York State and New York City rent

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[3,4,5] The 1993 New York City Housing and Vacancy Survey prepared by the New York City Department of Housing Preservation and Development.

regulatory laws but also proceeded in violation of New York State's Condominium Laws. New York General Business Law, Article 23-A §§ 352-359-h. Clearly, in 1983 when the building was converted, these non-purchasing tenants were justified in relying upon the integrity of these laws to preserve their right to remain in possession of their homes (AJ-342, AJ-345, AJ-348, AJ-351, AJ-354).

On February 22, 1991, RTC issued a policy statement which, inter alia, declared its intention to repudiate statutory leases where it determined that such leases were burdensome (A-39a)[6]. RTC's policy statement is based on RTC's belief that the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C.§ 1441a, preempts state and local rent and securities regulations and, therefore, enables RTC to repudiate statutory tenancies.

The policy as currently written states that it is not RTC's present intention to exercise its power to repudiate leases where a family or individual's income does not exceed 115 percent of the median income in the area involved. Pursuant to the Court of Appeals's decision in the instant case, the Federal Deposit Insurance Corporation ("FDIC") issued a policy statement similar to RTC's. [7]

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[6] References to petitioner's appendix are indicated as ("A-__").

[7] The FDIC's general guidelines for repudiation state that a lease should be considered for repudiation when the estimated value of the "unencumbered" unit is sufficiently higher (i.e., generally 25 percent or higher) relative to the value of the unit encumbered by a statutory lease (General Guidelines for Repudiation issued by FDIC's Division of Depositor and Asset Services).

RTC's policy not only threatens non-purchasing tenants of converted buildings but also threatens the well-being and security of rent and eviction protected tenants who reside in rental buildings unwisely over-financed by individual owners whose individual mortgages or loans may come under RTC or FDIC control.

In light of RTC's disregard for the longstanding rent and eviction protection enacted by the New York State Legislature, this voluntary concession involving low income residents is little reassurance that RTC will not renege on even this acknowledgement that the abrupt eviction of limited income urban tenants during a housing emergency, for RTC's economic profit, is against public policy.

In failing to acknowledge the hardship that eviction causes the elderly and disabled, and in failing to appreciate the disruption caused to the community by the exile of its longstanding residents, RTC demonstrates its limited understanding of the purposes of emergency rent and eviction regulation.

By its decision dated March 2, 1994, the United States Court of Appeals for the Second Circuit found that statutory tenancies are contract-based leaseholds, as defined by federal law, and therefore, the express language of FIRREA, 12 U.S.C. §1821(e)(1), permits RTC to extinguish statutory tenancies (A-17a-22a).

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals unjustifiably expanded the express authorization under 12 U.S.C. § 1821(e)(1), which enables RTC to disaffirm or repudiate any contract or lease it determines to be burdensome, to include the repudiation of statutory tenancies whose existence and terms are founded on legislative mandate.

The right to regulate the landlord/tenant relationship has long been regarded as residing with the states as a legitimate exercise of the police power. Pennel v. San Jose, 485 U.S. 1, 12 (1988); Bowels v. Willingham, 321 U.S. 503, 517-518 (1943); Seawall Associates. v. City of New York, 74 N.Y.2d 92, 105, 544 N.Y.S.2d 542, 542 N.E.2d 1059, cert. denied, 493 U.S. 976 (1989).

Federal law will not be presumed to preempt state law in areas traditionally considered within the police power of the states, unless the clear and manifest intention of Congress to do so is shown. Pacific Gas & Electric v. State Energy Resources Commission, 461 U.S. 190, 206 (1989)(quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); see also, General Motors Corp. v. Abrams, 897 F.2d 34, 41-42 (2d Cir. 1990).

Section 1821(e)(1) of FIRREA does not clearly manifest Congressional intent to preempt the states' traditional role in regulating the landlord/tenant relationship during housing emergencies. To the contrary, in establishing the RTC, Congress expressly required that the corporation conduct its operations in a manner which "minimizes the impact of such transactions on local real estate and financial markets". 12 U.S.C. § 1441a(b)(3)(C)(ii).

The qualified repeal of emergency rent and eviction regulation in New York City, whenever RTC deems the lawfully established rents to be burdensome, will produce a chaotic effect on the City's real estate and financial markets. To determine that lawfully established rents are "burdensome" is to assume that the market level rents are presumptively fair. Embracing such a presumption ignores the fundamental condition that necessitates government intervention, a serious public emergency.

"Rent regulation was established to restore fair bargaining relations for all parties in a market driven by a severe housing shortage. The ultimate goal of the [New York City] Rent Guidelines Board is to attempt to establish rents at levels that would exist in the absence of the housing shortage/emergency. That is, the Board attempts to establish increases that might occur if balanced bargaining relations existed between all owners and all tenants."[8]

Hence, statutory tenancies are created to prevent the wholesale eviction of tenants who are willing to pay a reasonable rent but who cannot agree with their landlords as to the amount to be paid. Stern v. Equitable Trust Co., 238 N.Y. 267, 269-270, 144 N.E. 578 (1924).

Rent and eviction regulation is not enacted as an anti-poverty measure and the fact that middle and low income families derive benefit from such regulation does

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[8] The testimony of Timothy Collins, the Executive Director and Counsel to the New York City Rent Guidelines Board, before the New York City Council Committee on Housing and Buildings, March 10, 1994. The New York City Rent Guidelines Board establishes rent adjustments for the City's rent-stabilized housing stock.

not change its primary function which is the preservation of affordable rental stock for the benefit of the tenant population as a whole.

B. The Court of Appeals' holding that tenancies created and maintained by emergency housing legislation are merely contractual leaseholds fails to recognize the vital public policy issues addressed by the noneviction aspect of these regulations.

The core of any community is the family and the heart of the family is the home. While rent and eviction laws formalize the process of establishing reasonable rents for housing accommodations in New York City, an equally essential function of this legislation for New York City is the preservation of family life in the home. The noneviction provisions are a means of protecting a certain class of occupants from the sudden loss of their homes. Braschi v. Stahl Assocs. Co., 74 N.Y.2d 201, 210, 544 N.Y.S.2d 784, 543 N.E.2d 49 (1989). The importance of these protections is demonstrated by the legislation and case law that has emerged over the issue of family "succession rights".

In Matter of Herzog v. Joy, 74 A.D.2d 372, 428 N.Y.S.2d 1 (1st Dep't 1980), aff'd, 53 N.Y.2d 821, 439 N.Y.S.2d 922, 422 N.E.2d 582 (1981), the New York State Court of Appeals recognized that the right of succession to a rent-controlled home applies not only to the spouse and family members of a deceased tenant but equally applies in situations where the primary tenant voluntarily vacates the home leaving family members in residence. The Court relied on the broad statutory and regulatory definition of "tenant" provided in the rent control regulations.

Furthermore, the Court noted that members of the family includes relatives more distant than siblings. Matter of Herzog, 74 A.D.2d at 375-376.

When the New York State Court of Appeals in Sullivan v. Brevard Associates, 66 N.Y.2d 489, 498 N.Y.S.2d 96, 488 N.E.2d 1208 (1985), found that the rent stabilization laws did not provide similar "succession" protection to the family members of a tenant who died or vacated a rent stabilized home, DHCR amended the Rent Stabilization Code to provide the right of succession. 9 NYCRR 2523.5(b)(1) and (b)(2). DHCR was constrained to act since the Sullivan decision "had the potential to expose spouses and children to summary eviction with little or no hope of finding affordable housing in New York City." Festa v. Leshen, 145 A.D.2d 49, 56, 537 N.Y.S.2d 147 (1st Dep't 1989); Lesser v. Park 65 Realty Corp., 140 A.D.2d 169, 173, 527 N.Y.S.2d 787 (1st Dep't), appeal dismissed, 72 N.Y.2d 1042, 534 N.Y.S.2d 940, 531 N.E.2d 660 (1988). Furthermore, the DHCR defined a "family member" to include 24 specified blood-or-marriage relationships. 9 NYCRR 2520.6(o).

In Braschi v. Stall Assoc. Co., 74 N.Y.2d 201, 544 N.Y.S.2d 784, 543 N.E.2d 49 (1989), the New York Court of Appeals recognized the need to include life partners of deceased tenants within the class of family members to be protected from eviction from their rent controlled homes. "Family members, whether or not related by blood, or law who have always treated the apartment as their family home will be protected against the hardship of eviction following the death of the named tenant, thereby furthering the Legislature's goals of preventing dislocation and preserving

family units which might otherwise be broken apart upon eviction." Id. at 212.

Following the criteria for defining "family member" applied by the Court of Appeals in Braschi , the Appellate Division, First Department extended noneviction protection to life partners residing in rent stabilized homes. East 10th Street Assoc. v. Estate of Stuart Goldstein, 154 A.D.2d 142, 552 N.Y.S.2d 257 (1st Dep't 1990).

In 1990 the DHCR amended the rent and eviction regulations to reflect the inclusion of persons residing with the tenant who can demonstrate an interdependence between themselves and the tenant stemming from an emotional and financial commitment as family members afforded noneviction protection. 9 NYCRR § 2520.6(2). In challenges to the regulations, the courts held that the regulations "advance the intended purposes of the rent stabilization and rent control succession provisions-to prevent the eviction of individuals with substantial ties to their home-apartment and to the former tenant of record." Rent Stabilization Association v. Higgins, 164 A.D.2d 283, 298, 562 N.Y.S.2d 962 (1st Dep't 1990); Rent Stabilization Association v. Higgins, 189 A.D.2d 594, 592 N.Y.S.2d 255 (1st Dep't),aff'd, 83 N.Y.2d 156, 608 N.Y.S.2d 930, 630 N.E.2d 626 (1993), cert. denied, _U.S._, 1994 WL 101168, 62 U.S.L.W. 3659 (U.S.N.Y., 6/13/94) (No. 93-1490).

A fundamental remedial function of rent regulatory legislation is to protect elderly, long-term and disabled tenants from the hardship of eviction. McMurray, v. New York State Division of Housing and Community Renewal, 135 A.D.2d 235, 238, 524 N.Y.S.2d 693 (1st Dep't),aff'd,

72 N.Y.2d 1022, 1024, 534 N.Y.S.2d 924, 531 N.E.2d 645 (1988). New York City's interest in assuring community stability is particularly evidenced in the protection afforded long-term urban tenants. Adm. Code § 26- 408(b); 9 NYCRR § 2204.5(a)

The protection afforded long-term tenants of rent and eviction regulated apartments is in recognition of the devastating impact that evictions can have on such tenants and their communities. By virtue of their longevity these tenants have strong ties to their community. The forced removal of long-term tenants from their familiar surroundings would cause severe hardship and dislocation, which in an urban setting such as New York, may lead to homelessness. Matter of McMurray, 72 N.Y.2d at 1024.

"The argument that a tenant of 20 years would face no greater hardship from eviction than other tenants ignores reality". Dawson v. Higgins, __A.D.2d__, 610 N.Y.S.2d 200 (1st Dep't 1994). Appeal filed in the New York Court of Appeals, May 10, 1994.

In New York State, the rent and eviction laws constitute a detailed response to housing shortages in New York City and reflect a legislative determination that New York's urban tenants should be protected from the dislocation which would occur in the absence of such action. The decision of the Court of Appeals if not reversed, will serve to undermine New York's legislative and administrative scheme. It does so without clear Congressional authority to override the legitimate exercise of New York's police power. For all the reasons set forth above and for the reasons presented in the brief of the

Attorney General of the State of New York, this Court should grant the petition.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED

Respectfully submitted,

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